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Contador faces a challenge of Alpe d'Huez proportions



Alberto Contador: all athletes have an obligation to present for sporting competition drug-free Pedro Armestre/AFP/Getty

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While uncertainty hangs over the cycling future of Alberto Contador, this year's Tour de France winner, what is certain is that he has a significant legal battle ahead where ultimately he will be required to prove his innocence of doping allegations that will be made against him by cycling's governing bodies.

As a professional cyclist and by competing in the Tour de France, Contador and his fellow competitors are subject to the anti-doping rules of the Union Cycliste Internationale (UCI) that adopts the regulations of the World Anti-Doping Agency (Wada) Code.

These rules operate under a strict liability legal regime. That is, all athletes are responsible for what they ingest and they have an obligation to present for sporting competition, drug-free.

If an athlete tests positive to a prohibited substance, then the law presumes that the athlete has committed a doping offence. However, if an athlete has an explanation that amounts to a legal defence of the doping allegations brought against him or her, then under the Wada code that athlete has to prove that defence on the balance of probabilities.

For Contador, the mere presence in his urine sample of the prohibited substance clenbuterol (no matter how miniscule a concentration), means that he has committed a doping offence under UCI anti-doping regulations and the Wada code.

The UCI has therefore no choice but to instigate legal process formally alleging that Contador has committed a doping offence, to which Contador can respond.

To completely overcome any legal finding that he committed a doping offence and that he serve a two-year suspension from participation in all sport (for a first offence), Contador must prove on the balance of probabilities that the circumstances that gave rise to the presence of clenbuterol in his body were exceptional and that he bears no fault or negligence for its ingestion.

At first instance, this will require a disciplinary tribunal of the Real Federacion Espanola di Ciclismo (RFEC) to judicially determine two important questions that will be decided on credibility.

First, did Contador on July 20 consume meat that was contaminated with clenbuterol?

And second, could meat contaminated with clenbuterol be capable of producing the presence of this prohibited substance in his urine sample in previously undetectable concentrations of 50pg/ml on July 21 and 20pg/ml on July 22?

In determining the answers to each of these questions the RFEC tribunal will need to hear evidence from Contador and any witnesses he calls in his case, including expert scientific witnesses with respect to the second question.

Also, it is possible that the RFEC may call evidence from its own expert scientific witnesses in opposition to those experts called by Contador.

Ultimately, the tribunal will have to determine which evidence is the most credible or reliable in reaching its decision.

Given the high stakes of this contest though, it is unlikely that the tribunal hearing will be the end of the matter.

All parties (including Contador, the RFEC, the UCI and the Wada) are able to appeal any decision of the tribunal, whatever the outcome, to the Court of Arbitration for Sport (CAS).

The court, which is a private international arbitral institution, is, in practical terms, the final international court of appeal for doping cases and is based in Lausanne, Switzerland.

Recently in the CAS, scientific evidence has played an important role in the determination of doping cases such as the one facing Contador.

Last year Richard Gasquet, the French tennis player, successfully invoked the no-fault or negligence defence in defeating doping allegations brought against him by the International Tennis Federation and the Wada, after he tested positive for cocaine.

The court accepted Gasquet's explanation and the evidence of witnesses he called in his case (including the expert scientists), that the traces of cocaine discovered in his urine sample were caused by him having kissed a woman in a nightclub, who had ingested cocaine shortly before Gasquet kissed her.

However, the standard applied by the court for the successful invocation of the no-fault or negligence defence that results in total exoneration is high.

In the many "inadvertent doping" cases heard by the court since 2002 where athletes - such as the US swimmer Jessica Hardy - have tested positive to prohibited substances after ingesting contaminated nutritional supplements or substances that were not clearly or incorrectly labelled, the court has preferred only partial exoneration by finding that such persons were without significant fault or negligence.

Even if an athlete is partially exonerated by raising a no significant fault or negligence defence, he or she still must face a minimum 12-month suspension as well as being automatically disqualified from the event in which he or she tested positive.

Also, when considering any doping allegations brought against Contador (use of a prohibited substance such as clenbuterol, or engaging in prohibited methods such as blood doping), the court is able to consider any further evidence of a reliable means and weigh such evidence accordingly.

In Contador's case, this could include analysis of his blood passport, and scientific evidence of traces of plastic found in his urine sample irrespective of whether or not a definitive test for such a procedure has been established.

While the outcome is uncertain and is likely to take months, Contador faces a legal challenge of Alpe d'Huez proportions and success depends upon not only his self-belief but also the belief of his adjudicators.

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